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BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF RAIL ACCESS AND COMPETITIVE ISSUES	)	EX PARTE NO. 575

REPLY COMMENTS

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DATE FILED: March 28, 2006

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Pursuant to the Board's procedural decision served February 1, 2006, ALBANY & EASTERN RAILROAD COMPANY (AERC) hereby replies to comments filed in this proceeding.

REPLY

Paper barriers have not been justified in the comments of the Class I railroads. They claim that paper barriers are justified as consideration for sale of a rail line where the purchase price is less than the going concern value of the line. On the contrary, purchase price is not a material factor in most rail line conveyances. There are numerous conveyances for a $10 purchase price or other nominal consideration. Major railroads are not only willing but are eager to convey uneconomic rail lines for nominal consideration because (1) the division of revenue or switching allowance that they pay to the Shortline is considerably less than the cost that they avoid by not switching the traffic at origin or destination; and/or (2) they realize other substantial cost savings as a result of no longer providing service on the line, such as avoiding the cost of a train crew; and (3) traffic to or from the line in not high-rated enough, or does not move in sufficient volume, to be attractive to the Class I rail carrier. Thus, purchase prices are low to facilitate rail line sales for the benefit of the selling Class I rail carrier, not for the benefit of the

Shortline purchaser. There is neither need nor justification for additional compensation to the Class I rail carrier in the form of a permanent paper barrier.

Viewed in that proper light, conveyances of rail lines are another form of de-marketing by Class I rail carriers. Class I rail carriers simply do not want to operate marginal or under-utilized rail lines. They will go to considerable lengths to rid themselves of those lines. It is an entirely hollow threat when the Class I railroads say that they will retain or abandon rail lines that they would otherwise convey to Shortlines if they were to be deprived of the ability to impose paper barriers. The offer-of-financial-assistance (OFA) provisions of 49 U.S.C. § 10904 provide protection for shippers and Shortlines in enabling acquisition of rail lines for their net liquidation value in lieu of abandonment. In that circumstance, Class I rail carriers would receive less than going concern value for their rail lines in any event. The Class Is would not be expected to hold onto unwanted lines because it would not be in their economic interest to do so. Any such dog-in-the-manger posture would be contrary to the public interest. As aptly put in the Comments of NASSTRAC, Inc. (at 7), such a posture would amount to "holding the public interest hostage to the self-interest of a regulated industry."

Even if a purchase price lower than going concern value could justify a paper barrier, the justification would last only as long as necessary to make up the difference in value. That was brought home effectively in the verified statement of Professor Paul Dempsey that is attached to the Comments of the Western Coal Traffic League (viz., at 3-4):

> . . . Once this difference has been paid by the shipper through rate payments for long-haul rail service, the long-term effect of the paper barrier is simply to enhance the profits of the Class I carrier.

As appears below, AERC does not believe that paper barriers should be permitted at all. However, if they are permitted, they should be allowed no longer than necessary to make up the difference between a rail line's going concern value and a lower purchase price paid for the line. In that respect, the rebuttable presumption set forth in Professor Dempsey's statement, that the difference will be made up in five years, appears to be a practical means to impose a reasonable limit on paper barriers.

Paper barriers should not be permitted because they unreasonably interfere with a shipper's statutory right to route its traffic to take advantage of the most efficient and economic rail service. *See* 49 U.S.C. § 10747(a). A shipper located on a Shortline that connects with Railroad A and Railroad B should have the right to ship via one of those railroads or the other in accordance with its view of efficiency and economy. For example, a shipper may choose to route its traffic via Railroad A as to destinations served solely by Railroad A because single line service in that instance (Shortline-Railroad A) may be deemed more efficient and economical than multiple-railroad service (Shortline-Railroad B-Railroad A) or rail-truck service (Shortline-Railroad B-truck delivery).

Obviously, a shipper's right to route in that manner is precluded if Railroad B has imposed a paper barrier against interchange with Railroad A when Railroad B conveyed the rail line to the Shortline. Not only is the existence of a paper barrier in that circumstance inconsistent with the shipper's statutory right to route, it is also very much inconsistent with the public interest. That is so because when the paper barrier forces a shipper to use a less efficient and less economical route, there are distinct adverse effects on rail transportation in general. Less

efficient routing increases rail transit time and correspondingly decreases railcar utilization. The general shipping public then suffers as a result of the adverse effect on overall freight car supply.

Paper barriers have serious adverse effects on Shortlines in addition to shippers. The ability of its shipper to use the most efficient route maximizes traffic and revenues for the Shortline serving the shipper. Conversely, a shipper may choose to ship from an origin other than that served by the Shortline if a paper barrier precludes use of the most efficient routing at the origin served by the Shortline. Loss of rail traffic is very harmful to Shortlines.

The Railroad Industry Agreement (RIA) is not an effective remedy for unreasonable paper barriers because it ignores those fundamental considerations of efficiency and economy. That was evident when AERC sought arbitration under the RIA for BNSF's refusal to waive a paper barrier to permit AERC to interchange limited traffic with UP. AERC expressly limited the requested waiver to destinations served solely by UP because AERC-UP routing for that traffic was clearly more efficient and economical than AERC-BNSF-UP routing or AERC-BNSF-Truck routing. Class I railroads, including BNSF, have consistently taken the position in rail merger cases and in other contexts that single-line rail routing is more efficient and economical than multiple-railroad routing or rail-truck transloading. In the RIA arbitration, however, BNSF stated that it was ready and willing to transport traffic to UP local points in multiple-railroad or rail-truck service. Under the arbitration standards of the RIA, the willingness of BNSF to transport the traffic was sufficient by itself to defeat the waiver of the paper barrier, without regard to considerations of efficiency or economy. Faced with certain denial of its waiver request, AERC withdrew the request. AERC's shippers were unable to use the more efficient and economical routes.

There surely are countless additional situations in which paper barriers are precluding shippers from routing their traffic in the most efficient and economical manner. For the reasons explained in the foregoing, paper barriers are inconsistent with the right of shippers to route their traffic under 49 U.S.C. § 10747(a), and are irreconcilable with the national rail policy in favor of efficient rail transportation and effective intramodal rail competition, as stated in 49 U.S.C. §§ 10101(1), (4), (5), (9) and (12).

CONCLUSION

WHEREFORE, for the reasons stated, the Board should adopt a rule prohibiting paper barriers in future rail line sales and leases.

In addition, the Board should state that it will entertain petitions under 49 U.S.C. § 10502(d) to revoke exemptions by which rail lines were sold or leased unless the selling or lessor rail carrier cancels paper barriers that were included in the sale or lease agreements.

Respectfully submitted,

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